

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARION PRICE, et al.,

Plaintiffs,

v.

THE CITY OF SEATTLE, et al.,

Defendants.

No. C03-1365P

ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION TO
DISMISS CLASS LIABILITY
CLAIMS

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment on Conversion Claim, (Dkt. No. 120), and Defendant the City of Seattle's ("the City") Motion to Dismiss Class Liability Claims, (Dkt. No. 123). Having reviewed the pleadings and supporting documents, and having heard oral argument by the parties, the Court hereby MODIFIES the class definition, GRANTS Plaintiffs' motion, and DENIES the City's motion.

For the reasons outlined below, the class is redefined to include "all registered owners of motor vehicles impounded by the City solely for driving while a license is suspended or revoked from March 20, 2000 through December 27, 2002." This excludes registered owners of motor vehicles impounded by the City for driving while a license is suspended or revoked ("DWLS") and other impoundable offenses.

The Court grants Plaintiff's motion. The City's DWLS impound policy did not allow officers to exercise the necessary discretion to consider the availability of reasonable alternatives to impound.

1 It was effectively a mandatory impound policy with limited exceptions. The City does not present
2 sufficient evidence to show a genuine issue of fact on this question. A policy barring consideration of
3 reasonable alternatives to impound is unlawful. Impounds carried out pursuant to such an unlawful
4 policy constitute conversion. Contrary to the City's contention that Plaintiffs cannot show causation
5 on a class-wide basis, causation is shown by the fact that all cars impounded solely for DWLS
6 violations were necessarily impounded pursuant to an unlawful policy. Post hoc rationalizations that
7 each of the impounds would have been reasonable under the circumstances does not save the City
8 from summary judgment.

9 The Court denies the City's motion. The key issue in Plaintiffs' impound related claims is the
10 nature of the City's policy and whether that policy was unlawful, not whether each impound for a class
11 member's car was reasonable under the circumstances. Similarly, the key issue in Plaintiffs' due
12 process post-impound hearing claim is the nature of the hearing that was available as a rule, not
13 whether each class member demanded a hearing in which to argue that the impound policy was
14 unlawful. Both are issues that are appropriate for class treatment.

15 BACKGROUND

16 According to Plaintiffs, the City implemented a policy since at least 1999, called "Operation
17 Impound," whereby it required police officers to impound every vehicle after its driver was pulled over
18 and it was discovered that the driver had a suspended license regardless of the circumstances and
19 whether there were reasonable alternatives to impoundment. The policy, according to Plaintiffs, did
20 not allow police officers the discretion to determine whether there were reasonable alternatives to
21 impound. The City denies these allegations and contends that officers did have discretion in
22 determining whether to impound such cars.

23 Plaintiffs filed suit alleging conversion, negligent, reckless, and wanton misconduct, unjust
24 enrichment, and violations of state statute, the Washington Constitution, and the Fourth and Fourteenth
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1 Amendments. The Court certified a damages class of “all registered owners of motor vehicles
2 impounded by the City for DWLS violations from March 20, 2000 through December 27, 2002.”

3 Plaintiffs now move for summary judgment on their conversion claim. The City moves to
4 decertify the class and dismiss the class claims.

5 ANALYSIS

6 Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City
7 of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying
8 facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus.
9 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Summary judgment will not lie if . . . the
10 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v.
11 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the
12 burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H.
13 Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden,
14 the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an
15 element essential to that party’s case, and on which that party will bear the burden of proof at trial.
16 Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving
17 party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue
18 for trial. Id. at 324. “The mere existence of a scintilla of evidence in support of the [non-moving
19 party’s] position will be insufficient; there must be evidence on which the jury could reasonably find
20 for the [non-moving party].” Anderson, 477 U.S. at 252.

21 I. Plaintiffs’ Motion

22 The tort of conversion is the willful and unlawful interference with a person’s use or
23 possession of his property. Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962);
24 Demelash v. Ross Stores, Inc., 105 Wn.App. 508, 522, 20 P.3d 447 (2001). Contrary to the City’s
25 contention otherwise, conversion need not involve a permanent deprivation of property; it includes

1 temporary deprivations. Id. If a municipality impounds a car pursuant to a policy that has been
2 deemed unlawful, the impound constitutes a conversion. Boss v. City of Spokane, 63 Wn.2d 305,
3 307, 387 P.2d 67 (1963) (impound pursuant to a police department policy that exceeded a city
4 ordinance amounted to a conversion).

5 For a vehicle impound to be lawful under Article I, § 7 of the Washington Constitution, the
6 impound must be reasonable. It is unreasonable to impound a vehicle if there is no probable cause and
7 “where a reasonable alternative to impoundment exists.” State v. Houser, 95 Wn.2d 143, 153, 622
8 P.2d 1218 (1980); State v. Hill, 68 Wn.App. 300, 306, 842 P.2d 996 (1993) (“In Washington,
9 impoundment is inappropriate when reasonable alternatives exist.”); State v. Coss, 87 Wn.App. 891,
10 898, 943 P.2d 1126 (1997). This principle underlies the Supreme Court’s decision in All Around
11 Underground. The central focus in All Around Underground was RCW 46.55.113, which provided
12 that when a driver is arrested for a DWLS violation, the vehicle is subject to impound, pursuant to
13 applicable local ordinance, at the direction of a law enforcement officer. The Supreme Court
14 interpreted this statute as merely granting discretionary authority to impound for DWLS violations but
15 not mandating impounds for DWLS violations. 148 Wn.2d at 154-55. Without passing judgment on
16 the constitutionality of RCW 46.55.113, the Court noted that grants of discretionary impound
17 authority have been found constitutional before, and in fact the constitution requires the officers
18 consider reasonable alternatives to impound, which necessarily relies on the officer exercising
19 discretion. Id. at 155 and n.8.

20 Here, the evidence outlined below shows that the City’s DWLS impound policy instructed
21 Seattle Police Department (“SPD”) officers to impound all cars involved in DWLS violations. While
22 the policy provided for limited exceptions (i.e. safety and/or officer being called away on emergency),
23 those exceptions did not include the consideration of reasonable alternatives to impoundment.
24 Similarly, while some officers may not have followed the policy, that does not negate the mandatory
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1 nature of the policy. In effect, the City had a mandatory impound policy allowing for limited
2 exceptions.

3 Plaintiffs present evidence from Seattle Police Department (“SPD”) that shows the mandatory
4 nature of the DWLS impound policy. First, SPD’s Operation Impound officer training documents
5 instructed officers to impound cars involved in DWLS violations in all circumstances unless extreme
6 circumstances justify not impounding, such as when the officer is called away on a pressing emergency
7 or when impoundment would put either the officer or the passengers in danger. (Berger Decl., Ex. 10
8 (“Not impounding the vehicle of a suspended driver is like not arresting a DWI suspect. This can only
9 be done on those rare occasions when extreme circumstances justify it.”), Ex. 11, Ex. 12 (“Even if the
10 registered owner was a passenger with a valid operator’s license and stated they were unaware that the
11 driver was DWLS, the vehicle may be impounded.”)).

12 Second, SPD’s policy on impoundments generally required the officer to consider reasonable
13 alternatives to impoundment as a basis for not impounding the car. (Id., Ex. 14 (“A vehicle should be
14 impounded only after all other reasonable alternative dispositions have been eliminated.”)). SPD’s
15 “Training Topic” on DWLS impounds specifically distinguished the procedures for DWLS impounds
16 from the procedures for impounds generally. (Id., Ex. 12 (“The purpose of this Training Topic is to
17 explain the procedure for citing, booking, and impounding vehicles driven by DWLS [] violators. For
18 information on other types of impounds, read Department Policy and Procedure Manual Section 2.089
19 on Impounding Vehicles [SPD’s policy on impoundments generally, cited above].”).

20 Third, in SPD records in individual DWLS cases from July, August, and September 1999,
21 SPD’s Lt. Getchman in charge of Operation Impound informed officers that all cars involved in
22 DWLS violations must be impounded and requested an explanation as to why those particular cars
23 were not impounded. (Id., Ex. 4).

24 Fourth, in an SPD memorandum to officers detailing the number of DWLS citations and
25 impounds for 2000 and 2001, Lt. Getchman indicated that “SPD would prefer 100% impoundment;

1 however discretion may be used for reasons of safety or when otherwise advisable.” (Id., Ex. 15).
2 The memo noted that approximately 4% of all DWLS citations did not result in a vehicle impound.
3 Plaintiffs point out that most of these were due to auto theft, accident, the car was a rental car or used
4 for a business, the officer was called away from the scene, or the officer felt compassion for the driver
5 and/or passengers.

6 Plaintiffs also present evidence from the City. In various individual impound appeals, Lt.
7 Getchman, the officer in charge of the Operation Impound program, stated unequivocally in an
8 affidavit that officers were instructed to impound all vehicles driven by DWLS violators (except in
9 cases where the officer was called away to handle an emergency situation). (Id. Ex. 2 (“[O]fficers
10 were instructed that impoundment of a vehicle driven by a person with a suspended driver’s license is
11 required in all cases and is not optional with the officer.”) (emphasis added)), Ex. 3). Other officers
12 testified in other individual impound appeals that SPD’s policy was to require impound in all cases
13 without considering the availability of reasonable alternatives. (Id., Ex. 5). After the Washington
14 Supreme Court issued its decision in All Around Underground, the City’s attorney wrote an internal
15 email on the decision stating that the Supreme Court’s ruling would apply to the City’s ordinance
16 because it was identical to the one struck down in All Around Underground. (Id., Ex. 19).

17 At oral argument, the City claimed that these affidavits and testimony from the individual
18 impound appeals should be discounted on the ground that the City’s defense is now different; counsel
19 claimed that the City was defending against potential equal protection claims in these prior cases,
20 whereas now it is defending against a class action conversion claim (as well as state and federal
21 constitutional claims. While the City may certainly change its legal defenses according to the claim
22 brought against it, it cannot change the facts. The City’s representatives testified under oath to
23 municipal and superior court judges that the policy was mandatory.

24 Using a different tactic, the City attempts to counter with evidence that it claims shows that the
25 City’s impound policy allowed officers to exercise discretion in deciding whether to impound cars

involved in DWLS violations. This evidence, however, is not sufficient to show that there is a genuine issue of fact as to the nature of the City's DWLS impound policy. First, two SPD officers state in declarations that they do not believe that the City ever had a mandatory impound policy and that based on their training, they were to use discretion in determining whether impound was warranted, including considering whether there were any alternatives to impoundment. (Hughey Decl., ¶ 6, Ornelas Decl., ¶ 10). Two officers' individual beliefs do not refute the existence of a policy that the City and SPD consistently asserted required mandatory impounds.¹ Second, SPD Chief of Police R. Gil Kerlikowske states in a declaration that the SPD did not have a policy requiring mandatory impounds of cars driven by DWLS violators and that officers were trained to use their discretion in determining whether to impound. (Dkt. No. 75, Ex. 39; see also Berger Decl., Ex. 18 (Kerlikowske Dep.)). Chief Kerlikowske's statements do not indicate that officers were trained to consider the availability of reasonable alternative to impound as a reason to decline to impound for a DWLS violation.

Third, the City points to deposition testimony by Lt. Getchman, but his testimony contradicts his prior unequivocal affidavit. "[A] party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991). This same logic applies when the witness first testifies via affidavit, but later testifies to the contrary in deposition. Lt. Getchman's deposition was taken November 2, 2004 -- well after this litigation was underway and the salient issues became clear to the parties. He stated that SPD was not trying to impound 100% of the cars, but then he was asked if he ever told officers that SPD would prefer 100% impound to which he responded that he had. (Buck Decl., Ex. 1 (Getchman Dep.) at 38). Lt. Getchman was asked if officers were instructed not to impound if a licensed driver was available, to which he answered that he did not know if they were instructed but he understood that officers had

¹ Additionally, as Plaintiffs note in their reply, the City does not provide any documentation to support these officers' statements about the training they received or the City's written policies.

1 discretion and would use it as necessary depending on the situation. (Id. at 41-42). Similarly, he was
2 asked if officers were instructed not to impound if the car could be legally parked at the scene, to
3 which he responded that officers perhaps had the option to leave the car parked but he could not point
4 to any written material to show that this was part of the City's DWLS impound policy. (Id. at 42-43).
5 To the extent that Lt. Getchman asserts in his deposition that SPD's policy was to allow officers to
6 exercise discretion, that assertion directly contradicts his prior affidavit that impoundment for DWLS
7 violations was not optional with the officers. Thus, this deposition testimony is not sufficient to
8 survive summary judgment.

9 The City argues unpersuasively that reasonableness can be determined only by looking at the
10 facts and circumstances of each individual case. As support, the City points to the various impounds
11 of cars driven by named Plaintiff Allen R. Nunnery, in which two officers state that they each exercised
12 discretion in deciding whether to impound Mr. Nunnery's car, including considering whether there
13 were any reasonable alternatives to impoundment, and concluded based on the circumstances that
14 impound was appropriate.² It is true that "[t]he reasonableness of a particular impoundment must be
15 determined from the facts of each case." Coss, 87 Wn.App. at 898; see also All Around Underground,
16 148 Wn.2d at 150 n.3. However, it is illogical to inquire into the reasonableness of the impounds done
17 pursuant to the City's DWLS impound policy when that policy barred the officer from making such an
18 inquiry. Regardless of whether the officers would have found any particular DWLS impound
19 reasonable because of a lack of reasonable alternatives, the City's policy was that the officer should
20 impound in all circumstances (unless called away on another emergency or the impound presented a
21 safety risk to the passengers). The City maintains that the officer's subjective understanding is not
22 controlling, but rather the objective facts determine the reasonableness of the impound. As such,
23 according to the City, post hoc determinations are acceptable in determining reasonableness. Under

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25 ² Officer Hughey decided not to impound Mr. Nunnery's car in a later encounter, but this
occurred in May, 2003, which was after the All Around Underground decision came out.

1 the City's theory, the City's policy would be irrelevant. That argument was rejected in All Around
2 Underground. The Supreme Court noted that the district court found in a post hoc fashion that the
3 impound at issue was reasonable and therefore compliant with the constitutional requirement to
4 exercise discretion. 148 Wn.2d at 150 n.2. The Supreme Court rejected that finding because it was
5 based on faulty logic. Because the state patrol regulation at issue divested officers from exercising
6 discretion, the officer "cannot have reasonably exercised discretion he did not have." Id. Thus, it is
7 illogical to justify impounds based on a post hoc reasonableness determination if the policy authorizing
8 the impound barred the officer from considering the reasonableness at the time. Because the City's
9 policy barred the officers from considering the availability of reasonable alternatives to impound, the
10 reasonableness of each of the impounds at issue has no bearing on whether the City impounded these
11 cars pursuant to an unlawful policy.

12 Lastly, the City's causation argument is not persuasive. Plaintiffs conceded at oral argument
13 that it may be appropriate to redefine the class to include only owners of cars that were impounded
14 solely for DWLS violations. By redefining the class as such, all of the cars impounded that fall within
15 the class were necessarily impounded pursuant to the City's DWLS impound policy. Therefore,
16 individual inquiries into the cause of the impound are not necessary.

17 In sum, the City's DWLS impound policy unlawfully precluded officers from considering the
18 availability of reasonable alternatives when determining whether to impound a car driven by a DWLS
19 violator. Because SPD officers impounded cars driven by DWLS violators pursuant to an unlawful
20 policy, the City is liable for conversion.

21 II. The City's Motion

22 The City argues that the class must be decertified because the lawfulness of each of the
23 impounds at issue depends of whether each impound was reasonable in light of the particular
24 circumstances of each case and that this is a fact-specific determination inappropriate for class
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1 treatment. Similarly, the City argues that the lawfulness under due process requirements of the post-
2 impound hearings is a fact-specific determination inappropriate for class treatment.

3 The City fails to present new evidence or new legal authority to justify bringing a motion on
4 issues that the Court has addressed on previous occasions. Further, the analysis above effectively
5 resolves the City's motion. Class treatment is appropriate because the core issue in this case is the
6 nature of the City's DWLS impound policy and its post-impound hearing procedure.

7 CONCLUSION

8 The Court MODIFIES the class definition to include "all registered owners of motor vehicles
9 impounded by the City solely for driving while a license is suspended or revoked from March 20, 2000
10 through December 27, 2002." This excludes registered owners of motor vehicles impounded by the
11 City for DWLS violations and other impoundable offenses.

12 The Court GRANTS Plaintiff's motion. The City's DWLS impound policy did not allow
13 officers to exercise the necessary discretion to consider the availability of reasonable alternatives to
14 impound. It was effectively a mandatory impound policy with limited exceptions. The City does not
15 present sufficient evidence to show a genuine issue of fact on this question. A policy barring
16 consideration of reasonable alternatives to impound is unlawful. Impounds carried out pursuant to
17 such an unlawful policy constitute conversion. Contrary to the City's contention that Plaintiffs cannot
18 show causation on a class-wide basis, causation is shown by the fact that all cars impounded solely for
19 DWLS violations were necessarily impounded pursuant to an unlawful policy. Post hoc
20 rationalizations that each of the impounds would have been reasonable under the circumstances does
21 not save the City from summary judgment.

22 The Court DENIES the City's motion. The key issue in Plaintiffs' impound related claims is
23 the nature of the City's policy and whether that policy was unlawful, not whether each impound for a
24 class member's car was reasonable under the circumstances. Similarly, the key issue in Plaintiffs' due
25 process post-impound hearing claim is the nature of the hearing that was available as a rule, not

1 whether each class member demanded a hearing in which to argue that the impound policy was
2 unlawful. Both are issues that are appropriate for class treatment.

3 The clerk is directed to provide copies of this order to all counsel of record.

4 Dated: June 27, 2005

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7 Marsha J. Pechman
8 United States District Court
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